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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 254

ROCK CREEK PLAZA, INC., *Petitioner,*

v.

JULIAN H. ZIMMERMAN, Commissioner of the Federal Housing Administration, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the order of the United States District Court for the District of Columbia, enjoining petitioner from operating as a hotel any part of its premises known as "The Woodner" at 3616 16th Street, N. W., Washington, D. C.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 164 F. Supp. 269 (App. 1a).[1] The opinion of the Court of Appeals is reported at 266 F. 2d 695 (App. 18a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1959 (App. 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Housing Act of 1954, 68 Stat. 610, 12 U.S.C. § 1731b, creates an indefeasible right to operate transient facilities in housing projects financed through Federal Housing Administration insured mortgage loans, where those projects had prior approval of the Commissioner of Federal Housing Administration to operate transient facilities.

STATUTE INVOLVED

Housing Act of 1954, 68 Stat. 310, 12 U.S.C. § 1731b:

> "(a) The Congress declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

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[1] Citations to the record and appendices in this case have been abbreviated as follows:

Joint Appendix in Court of Appeals—R.
Appendix to Petition for Writ of Certiorari—App.

"(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (*in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis*), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis). (Emphasis supplied.)

. . . . .

"(d) The Commissioner is authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to August 2, 1954, as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to August 2, 1954.

. . . . .

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully

issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

"(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices; and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

. . . .

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

STATEMENT

Petitioner, a Maryland corporation, operates a Rental Housing Project, known as "The Woodner," in Washington, D. C. In July 1955, respondent's predecessor in office, Norman P. Mason, instituted proceedings against petitioner seeking to prohibit the use of any facilities in the project for transient purposes (R. 3). This action was commenced under § 513 of the Housing Act of 1954. On June 30, 1958, the district court rendered an opinion in which it concluded that petitioner's use of a portion of the premises for transient purposes was violative of the National Housing Act, 56 Stat. 303, 12 U.S.C. § 1743, as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214 (R. 346, App. 1a).

Unlike the situation in *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, decided by this Court early in the October 1958 term, petitioner herein had obtained written authority from the Commissioner of FHA to operate 250 units, of a total in excess of 1100 in the project, on a transient or hotel basis (R. 233-34). This authority was granted in August 1952 when the District of Columbia zoning board declined to permit petitioner to operate certain planned commercial facilities, such as drug store, beauty parlor and dining room, unless they were adjuncts to hotel housing (R. 80-81, 171-172). This admittedly was an appropriate application of the local zoning regulations, although inconsistent with the same board's earlier approval of petitioner's construction plans wherein the commercial facilities were disclosed as apartment adjuncts.

FHA's approval, however, restricted the number of units which were to be used for transient housing, and denied to petitioner the right to advertize its hotel ac-

commodations or to employ bellboys on the premises (R. 233-34). It also sought to limit the duration for which the authority was valid. The approval was to be effective only so long as hotel or transient accommodations continued to be a prerequisite to the use of the commercial facilities by virtue of the District of Columbia zoning regulations (R. 233-34).

In 1954 the zoning regulations were amended to permit commercial adjuncts to apartment dwellings if certain conditions existed (R. 314). Thus, the necessity for hotel facilities was eliminated in certain instances in the District of Columbia.

Some time prior to the adoption of this zoning amendment, however, the Housing Act of 1954, 68 Stat. 310, 12 U.S.C. § 1731b, was enacted. This Amendment to the National Housing Act declared that it had been the intent of Congress since the enactment of the National Housing Act that housing built under that program be used principally for residential purposes, and that this intent excluded the use of such housing for hotel or transient purposes. Despite this sweeping prohibition, § 513(b) of the Amendment contained specific authorization for the operation of a limited number of hotel accommodations in instances where the Commissioner of FHA had agreed to same prior to May 24, 1954. It is within this exception that petitioner found itself, for the Commissioner had given his approval to the rental of 250 units on a transient basis in August 1952 (R. 233-34).

Aside from this, however, petitioner initially believed itself to be eligible under the zoning amendment and in November 1954 made application for permission to establish a food store as an adjunct to its apartment dwellings (R. 275).

Before the District of Columbia Board of Zoning Adjustment formally acted on this matter, petitioner determined that it was not eligible to apply for such authority under the 1954 zoning amendment and accordingly sought to withdraw its application (R. 241-42).

The instant litigation resulted when petitioner refused to comply with FHA's direction that petitioner process the necessary application with the Board of Zoning Adjustment to obtain permission for the establishment of commercial facilities as apartment adjuncts (R. 238-39). When petitioner notified FHA that it could not do so, FHA adopted the position that petitioner had violated a contract, *viz.* the authority of August 1952, and that consequently FHA was warranted in rescinding *in toto* that contract (R. 240-41). The contract being avoided, petitioner then would no longer fall within the exception to the general interdiction of the Housing Act of 1954, which permitted limited transient rentals in those instances where the Commissioner had agreed to such rentals on or before May 24, 1954.

Petitioner denied violating the terms of the August 1952 authority and denied its eligibility to qualify under the 1954 amendment to the zoning regulations. Petitioner further urged that enactment of the Housing Act of 1954 so modified the August 1952 approval that the sole limitation upon petitioner's right to rent to transients was that no more than 250 units could be devoted to that purpose. Petitioner urged that except as expressly adopted by the 1954 enactment the prior limitations on its rights were invalid, and that it was then free to operate 250 units on a hotel basis subject, of course, to FHA's control of rent schedules.

The district court upheld FHA in this matter, concluding that petitioner had acted in bad faith in refusing to make application with the zoning board, and that petitioner had advertised and employed bellboys about the premises in violation of FHA's approval. Accordingly the court upheld FHA's rescission of the August 1952 approval (R. 346, App. 1a). Petitioner was given until October 31, 1959, to discontinue its transient operations (R. 360, App. 16a). This decision of the district court was upheld on appeal by the United States Court of Appeals for the District of Columbia Circuit (App. 18a).

REASONS FOR GRANTING THE WRIT

This case presents an important question raised but not resolved by the decision of this Court in *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84. In *Darlington* this Court concluded that housing projects constructed under the provisions of the National Housing Act, 56 Stat. 303, 12 U.S.C. § 1743, as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214, had no right or privilege to rent accommodations to transients. It was not necessary, however, there to determine whether or not FHA had authority to approve rent schedules for transients, or to determine the effect of § 513(b) of the 1954 Housing Act, 68 Stat. 610, 12 U.S.C. § 1731b, upon the approvals FHA had given prior to May 24, 1954. This is the issue raised herein.

The courts below have held in effect that the 1954 Amendment adopted in their entirety the various approvals of transient rent schedules which FHA had granted prior to the May 24 date. Thus, despite the apparent intention of Congress to permit some proj-

ects to operate as a hotel on a fully competitive basis, the holding of the courts below compels these projects to operate in accordance with the restrictive terms of the approval received from FHA. While the extent of the variations in these approvals is not known, a project such as petitioner's cannot advertise, cannot employ bellboys for the convenience of transient guests, must retain cumbersome kitchen equipment in all hotel accommodations, and must always face the prospect of losing its right to offer transient or hotel accommodations altogether. This last element serves only to discourage the making of improvements and investments designed to keep the hotel facilities on a par with competitors not so restricted.

Obviously the net result of such restrictions as were imposed upon petitioner was to jeopardize the financial position of the project because of its inability to compete freely and fairly with others in the hotel industry. While such a result might serve the best interests of privately financed hotel operators,[2] there is no support for the conclusion that it is consistent with the policy expressed by Congress in § 513(b) of the 1954 Amendment. The suggestion that Congress intended to deprive these projects of the right to make efficient and effective use of their authorized hotel accommodations is incredible.

This Court in *Darlington* expressed some question with regard to the authority of FHA to authorize rent schedules for transients. 358 U.S. at 89-90. At the

[2] Mr. Justice Harlan dissenting in *Darlington* noted that the 1954 Amendment appeared to be designed "to afford relief for private interests, as distinguished from public purposes. . . ." 358 U.S. 93, 98. Such a design appears to be further promoted by the lower courts' construction of the 1954 Act.

same time it was noted that the Housing Act of 1954 expressly gave FHA that power. 358 U.S. at 90 n. 5. What effect, however, did the 1954 Amendment have upon the prior FHA approvals?

As the law presently stands the 1954 Amendment adopted *in toto* all of the restrictive terms and conditions appearing in the various approvals. Petitioner submits this to be incorrect and maintains that only insofar as the prior approvals are consistent with the 1954 Amendment can they be deemed adopted. As pointed out above, restrictions prohibiting advertising or the use of bellboys are not consistent with the expression by Congress that certain projects may operate as hotels. Nor is the threat of losing altogether the right to so operate.

The restriction of the number of accommodations to be used, as appearing in the August 1952 approval, is expressly adopted by the 1954 Amendment. No other restriction is so adopted. This affirmative description of a single limitation appearing in the 1954 Amendment negates the existence of any other limitation upon the right to rent on a transient basis. See *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 288; *Brooks* v. *St. Louis-San Francisco Ry. Co.*, 180 F. 2d 185, certiorari denied, 339 U.S. 966.

The fact that FHA's August 1952 approval was designed to be consistent with a policy prohibiting transient rentals is not justification for a conclusion that the approval survived in its entirety the 1954 Amendment. Certainly, the terms of the various FHA approvals cannot be sustained merely because they are more restrictive than Congress' expression in the 1954 Amendment. Cf. *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597. Section 513(b) of

the Amendment expresses a policy contrary to that previously adhered to by FHA and as the 1952 approval is inconsistent with the most recent expression of Congress the approval must be deemed superseded. Cf. *United States* v. *Claflin*, 97 U.S. 546.

By the ruling of the courts below it appears that FHA may make a re-determination as to the necessity for a particular project to continue hotel facilities. Thus, if it be determined that a change of circumstances has transpired, such as an increase in the number of privately financed hotels or a decrease in demand for hotel facilities, the earlier approval of the use of certain facilities for hotel purposes may be rescinded. Quite obviously this was never intended by the Congress in its enactment of the Housing Act of 1954.

This case then presents the very issues not presented in *Darlington*. Upholding respondent in its contentions would be an invitation for future litigation centering about the 1954 Amendment. Moreover, the construction of the 1954 Act arrived at by the courts below flies in the face of the unambiguous expression of that statute. The importance of this question in the efficient administration of the National Housing laws is a compelling reasoning for the granting of a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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July, 1959.